STATE OF MICHIGAN

COURT OF APPEALS

MARILYN ROSE LUTHER, Plaintiff-Appellee,	UNPUBLISHED February 19, 2008
v	No. 271587 Livingston Circuit Court
JOHN ERIC WIK, Defendant-Appellant.	LC No. 06-036815-DZ

Before: Davis, P.J., and Murphy and White, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's order of custody and parenting time awarding plaintiff sole physical custody, the parties joint legal custody, and defendant parenting time of alternate weekends and holidays, and 30 days in the summer. We affirm.

The minor child, Alissa, was born on September 16, 1998. Plaintiff and defendant lived together with Alissa for the first six months of her life in the Farmington area. Subsequently, they lived apart, and eventually plaintiff moved to Fowlerville, where she purchased a home with her fiancé.

In June 2005, the trial court entered an ex parte order awarding plaintiff sole physical custody of Alissa. The issue of parenting time was reserved. Defendant objected to the ex parte order, claimed that the custody issue had not been determined by any court, and claimed that defendant provided Alissa an established custodial environment until the 2004-2005 school year. The parties entered into a consent agreement with a temporary award of custody and parenting time. Plaintiff received physical custody and defendant received parenting time of the first three weekends of every month, alternate holidays, and Wednesday evenings for three hours. Extended parenting time for the summer was not addressed. The order indicated that it was a temporary order, pending further hearing. On January 6, 2006, the court entered a consent order that set a hearing regarding the issues of parenting time and custody before a Friend of the Court referee on March 14, 2006.

At the March 14, 2006, evidentiary hearing before the referee, defendant relinquished his claim to custody, and the parties worked toward a parenting time agreement. The parties could not agree. Defendant desired parenting time of three weekends per month and 45 days in the summer. Plaintiff wished to change to a "normal" parenting time schedule of alternate weekends and 30 days in the summer. One of the most important issues discussed during this hearing was how to transport Alissa to and from her parenting time. Defendant does not have a driver license

and works until early evening every Friday night. Plaintiff is unable to transport Alissa on Friday nights, and defendant can only provide transportation if his mother or fiancée is allowed to transport Alissa. At the hearing, the parties ultimately agreed that defendant's fiancée or mother could transport Alissa to defendant's home, and that plaintiff would transport her on the return trip on Sunday evenings. During the hearing, the referee noted that he had some hesitation with allowing the parenting time to continue for three weekends per month, but that defendant's investment in his relationship with Alissa, and plaintiff's choice to move Alissa to a new city, may justify the unusual arrangement.

The referee recommended that defendant continue to receive three weekends per month of parenting time and 45 days of extended parenting time in the summer. Defendant objected because the recommendation required that he be present for his parenting time transportation responsibilities. Plaintiff objected to the referee's recommendation because she desired "normal" parenting time of alternate weekends and 30 days in the summer.

On May 2, 2006, the trial court held a hearing on these objections to the referee's recommendation. Both parties were represented by counsel, who had the opportunity to express each party's position. The referee also gave a summary of the proceedings to the court. At the end of the hearing, the trial court ordered that defendant be granted parenting time on alternate weekends and holidays, with 30 days extended parenting time in the summer. On May 22, 2006, the trial court issued a supplementary order that specified the date on which parenting time was to begin following the new schedule, and explicitly allowed defendant's mother and fiancée to transport Alissa to defendant's parenting time.

Defendant then moved for rehearing or reconsideration, arguing that the trial court failed to conduct a de novo hearing after his objection to the referee's recommendation, and that he was prevented from offering live testimony at the hearing. The trial court denied his motion.

I

Defendant contends that the trial court failed to conduct a de novo hearing regarding parenting time, although defendant properly objected to the referee's findings within the statutory period. He maintains that a trial court is not permitted to base its opinion solely on the referee's report and recommendation unless the parties stipulate to that method.

This Court reviews issues of statutory construction de novo. *Lash v City of Traverse City*, 479 Mich 180, 186; 735 NW2d 628 (2007). Effective October 1, 2004, MCL 552.507, the statute regarding the requirements for de novo hearings related to issues previously decided by a friend of the court referee, was amended. The court rule, MCR 3.215(F)(2), was changed to comply with the statute effective May 1, 2005. The ruling defendant appeals was made after these changes to the statute and court rule; however, defendant's argument is based on case law interpreting and applying the older versions of the statute and court rule. Because the trial court conducted a de novo hearing as it is currently described in MCL 552.507(4), (5), and (6), we affirm the trial court's order.

The purpose of statutory construction is to "discern and give effect to the Legislature's intent." *Elezovic v Ford Motor Co*, 274 Mich App 1, 5; 731 NW2d 452 (2007). If the plain language of the statute is unambiguous, then "no judicial construction is permitted, and the

statute must be enforced as written." *Id.* Before October 1, 2004, MCL 552.507 provided in pertinent part:

> (5) The court shall hold a de novo hearing on any matter that has been the subject of a referee hearing, upon the written request of either party or upon motion of the court. The request of a party shall be made within 21 days after the recommendation of the referee is made available to that party under subsection (4), except that a request for a de novo hearing concerning an order of income withholding shall be made within 14 days after the recommendation of the referee is made available to the party under subsection (4).

In *Cochrane v Brown*, 234 Mich App 129, 132; 592 NW2d 123 (1999), this Court interpreted the statutory requirement for a de novo hearing. The Court explained that the statute required a "de novo hearing" rather than "de novo review." *Id.* at 132. The Court held that, based on the limitations in MCR 3.215(F)(2), a de novo review of the record, without more, could only constitute a de novo *hearing* where both parties consented. *Id.*

However, effective October 1, 2004, the Legislature amended MCL 552.507, renumbering section (5) as (4), and adding sections (5) and (6), which state:

> (5) A hearing is de novo despite the court's imposition of reasonable restrictions to conserve the resources of the parties and the court if the following conditions are met:
>
> (a) The parties have been given a full opportunity to present and preserve important evidence at the referee hearing.
>
> (b) For findings of fact to which the parties have objected, the parties are afforded a new opportunity to offer the same evidence to the court as was presented to the referee and to supplement that evidence with evidence that could not have been presented to the referee.
>
> (6) Subject to subsection (5), de novo hearings include, but are not limited to, the following:
>
> (a) A new decision based entirely on the record of a previous hearing, including any memoranda, recommendations, or proposed orders by the referee.
>
> (b) A new decision based only on evidence presented at the time of the de novo hearing.
>
> (c) A new decision based in part on the record of a referee hearing supplemented by evidence that was not introduced at the previous hearing.

Here, as MCL 552.507(5) requires, the parties were given a full opportunity to present evidence at the referee hearing. They both addressed the referee and explained their positions. It is undisputed that the hearing was taped and later transcribed, to ensure preservation of the

evidence. Neither party claims on appeal that they were not given a full opportunity to present evidence at the referee hearing. More importantly, the parties' objections to the referee's recommendation were not objections to factual issues. Defendant objected only to the fact that the referee neglected to include a provision that would allow defendant's fiancée or his mother to transport Alissa to his parenting time. Plaintiff objected to the referee's ultimate decision, and requested that defendant receive alternate weekends and 30 days in the summer for parenting time, and that defendant pay her attorney fees. None of these are findings of fact that would require the presentation of evidence under MCL 552.507(5)(b). Therefore, both the conditions found in MCL 552.507(5) were met, and the trial court was permitted to conduct a de novo hearing on the basis of the record alone. See *Dumm v Brodbeck*, 276 Mich App 460, 464-465; 740 NW2d 751 (2007).

Because the trial court met the criteria for a de novo hearing listed in MCL 552.507, and reviewed the record by listening to the referee's accurate summary, we conclude that the trial court conducted a de novo hearing pursuant to MCL 552.507. *Dumm*, *supra* at 464-465.

II

Defendant also asserts that the trial court violated the court rule that requires the court to allow parties to provide live evidence in judicial hearings regarding parenting time, because the hearing was during motion call and defendant could not provide live evidence. Statutory interpretation involves a question of law this Court reviews de novo. *Adams v Linderman*, 244 Mich App 178, 184; 624 NW2d 776 (2000).

Under the Michigan court rules, the parties to a parenting dispute have the right to present live evidence during a judicial hearing on matters previously heard by a referee. MCR 3.215(F)(2). After MCL 552.507(4), (5), and (6) were rewritten to allow the trial court to hold a de novo hearing by reviewing the record, without regard to the parties' consent, the related court rule was also amended. MCR 3.215(F)(2) now states:

> (2) To the extent allowed by law, the court may conduct the judicial hearing by review of the record of the referee hearing, but the court must allow the parties to present live evidence at the judicial hearing. The court may, in its discretion:
>
> (a) prohibit a party from presenting evidence on findings of fact to which no objection was filed;
>
> (b) determine that the referee's finding was conclusive as to a fact to which no objection was filed;
>
> (c) prohibit a party from introducing new evidence or calling new witnesses unless there is an adequate showing that the evidence was not available at the referee hearing;
>
> (d) impose any other reasonable restrictions and conditions to conserve the resources of the parties and the court.

Thus, while the parties have the right to present live evidence, this right is not absolute. Within the trial court's discretion, the court may prohibit parties from presenting evidence where the

parties did not object to that issue or where the evidence was available during the referee hearing. MCR 3.215(F)(2).

Here, defendant did not assert his right to present live evidence during the May 2, 2006 hearing. Further, defendant did not show the trial court that he had evidence to present that was related to an objection of the parties and was unavailable during the referee hearing. Thus, under MCR 3.215(F)(2)(b) and (c), even if defendant had requested the opportunity to present live evidence, the trial court would have been within its discretion to deny defendant the opportunity. Therefore, the trial court did not commit error requiring reversal with respect to defendant's right to present live evidence.

III

Defendant's last argument is that the trial court simply used the standard Friend of the Court formula and did not consider the specific situation of the parties in determining parenting time. Defendant maintains that this was a gross abuse of discretion, particularly in light of the fact that the trial court did not explain its consideration of the best interests of the minor child.

This Court reviews a parenting time order de novo, but "will not reverse the order unless the trial court made findings of fact against the great weight of the evidence, committed a palpable abuse of discretion, or committed a clear legal error." *Brown v Loveman*, 260 Mich App 576, 591-592; 680 NW2d 432 (2004). Clear legal error exists when the trial court "errs in its choice, interpretation, or application of the existing law." *Shulick v Richards*, 273 Mich App 320, 323; 729 NW2d 533 (2006). In a child custody case, an abuse of discretion exists where the result is "so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias." *Id.* at 324-325, quoting *Spalding v Spalding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959).

Under Michigan law, "[v]isitation shall be granted if it is in the best interests of the child . . ." *Deal v Deal*, 197 Mich App 739, 741; 496 NW2d 403 (1993). The visitation should be of the frequency, duration, and type that is "reasonably calculated to promote a strong relationship between the parent and the child." *Id.* The trial court should consider the factors related to the best interests of the child listed in MCL 722.23, and the specific parenting time factors listed in MCL 722.27a.[1] However, where parenting time alone is at issue, the trial court is not required to

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[1] MCL 722.27a(6) states:

> The court may consider the following factors when determining the frequency, duration, and type of parenting time to be granted:
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> (a) The existence of any special circumstances or needs of the child.
>
> (b) Whether the child is a nursing child less than 6 months of age, or less than 1 year of age if the child receives substantial nutrition through nursing.
>
> (c) The reasonable likelihood of abuse or neglect of the child during parenting

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make a finding on each specific factor. *Hoffman v Hoffman*, 119 Mich App 79, 83; 326 NW2d 136 (1982). Instead, the trial court may focus on only those factors which are contested. *Id.*

Here, the trial court did not place any findings of fact on the record. The trial court did not discuss either the factors related to the child's best interest or those specific to parenting time. However, it does not appear from the record that any of the factors listed in MCL 722.27a(6) were actually contested. The only statutory factor implicated by the parties' discussion during the evidentiary and motion hearings was the factor related to difficulties with transportation. MCL 722.27a(6)(e). This issue was addressed by the trial court when it ordered that defendant did not have to be present during Alissa's transportation to his parenting time. Further, the referee specifically considered each of the parenting time factors in his written report and accurately presented the issues to the court. Plaintiff objected to the ultimate decision made by the referee regarding defendant's parenting time, but neither she nor defendant contested any of the referee's findings on the parenting time factors.

Under these circumstances, we cannot say that the trial court's decision defied reason or was made out of bias and we conclude that the trial court did not commit a palpable abuse of discretion.

Plaintiff argues that defendant's appeal is frivolous and requests attorney fees in the amount of $2,850. However, plaintiff cites no authority to explain what constitutes a frivolous appeal or to support that this Court should grant attorney fees. Therefore, plaintiff has abandoned this issue, and this Court is not required to review it. *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999).

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time.

(d) The reasonable likelihood of abuse of a parent resulting from the exercise of parenting time.

(e) The inconvenience to, and burdensome impact or effect on, the child of traveling for the purposes of parenting time.

(f) Whether a parent can reasonably be expected to exercise parenting time in accordance with the court order.

(g) Whether a parent has frequently failed to exercise reasonable parenting time.

(h) The threatened or actual detention of the child with the intent to retain or conceal the child from the other parent or from a third person who has legal custody. A custodial parent's temporary residence with the child in a domestic violence shelter shall not be construed as evidence of the custodial parent's intent to retain or conceal the child from the other parent.

(i) Any other relevant factors.

Affirmed.

/s/ Alton T. Davis
/s/ William B. Murphy
/s/ Helene N. White